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No. 91-1536

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1991

IRENE O'CONNELL KRUSE
AND
FREDERICK E. WATSON,
Petitioners,

vs.

COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, WILLIAM A. NEWSOM; JOHN T. RACANELLI, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES AS MEMBERS OF DIVISION ONE OF THE SAID COURT OF APPEAL; SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SONOMA; WINSLOW CHRISTIAN; BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION; LELAND PARACHINI, STEINBERG, FLINN, MATZGER & MELNICK; DAVID B. FLINN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Rule 15.7 provides a Supplemental Brief may be filed calling attention to intervening matters not available at the time of the last filing. Implicit in the rule of course, is the requirement that the intervening matter be relevant and material to the questions raised in the Petition. The intervening matter to which attention is called herein, and the relevance and materiality of same, can be summarized as follows:

Petitioners' petition was filed March 11, 1992. The principal reason relied upon for granting the writ was Petitioners' contention that the record discloses that the Court of Appeals, acting through a panel which included the Honorable John T. Noonan, so far departed from the accepted and usual course of judicial proceedings in this *Kruse* case, as to call for the exercise of this Court's power of supervision. Further, that said panel of the Court of Appeals sanctioned just such a previous departure from the accepted and usual course of judicial proceedings, by the District Court acting through the Honorable Marilyn Hall Patel, and for this additional reason, exercise of this Court's power of supervision is called for in this *Kruse* case.

Thus, any intervening events or matters tending to prove and establish that there was such departure from the accepted and usual course of judicial proceedings in the present *Kruse* case, are properly brought to the attention of this Court.

Accordingly, this Supplemental Brief discusses the subsequent actions and conduct, in April, 1992, of the same District Judge Patel in issuing a stay of execution of convicted murderer Robert Harris, and the actions and conduct of the same Circuit Judge Noonan, in voting for the Ninth Circuit's issuance of stays of execution of Harris; as well as Judge Noonan's publication in the April 28, 1992 edition of the New York Times, of an article in which he strongly criticized this Court's vacating of the Ninth Circuit's stays of execution of Harris, and enjoining the lower courts from issuing any further stays without permission of this Court.(App. J pp.1-2)[1] Judge Noonan's article asserted that the judicial action of this Court improperly forced the lower courts to "commit 'treason to the Constitution' and abstain from

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[1] Attached to this Supplemental Brief is a Supplemental Appendix, which commences with Appendix J, since the last Appendix to the Petition was Appendix I.

exercising...jurisdiction...to delay an execution to decide a constitutional question." By this accusation, Judge Noonan implied, we submit, that this Court itself violated the Constitution.

We suggest that the said actions and conduct of Judge Patel and Judge Noonan are intervening events which, when properly analyzed, conclusively demonstrate that the District Court and the Court of Appeals departed from the accepted and usual course of judicial proceedings in almost identical fashion in the *Harris* case and in the present *Kruse*; so that just as this Court found it necessary and proper to exercise its power of supervision to correct error in the *Harris* case, so likewise is there compelling need and justification for exercise of that power of supervision to correct error in the present case.

This is so because, as we shall show, it appears that in both the *Harris* case and the present *Kruse* case, Judge Patel and Judge Noonan and his colleagues on the Court of Appeals who voted with him in the *Harris* and *Kruse* cases; took the position that they were not bound to follow the rule of law and decisions of this Court, but rather were free to consult their own judicial conscience and decide any case or matter in such manner as to reach what they personally were convinced was the morally correct and desirable result, even if that meant disregarding the established rule of law and decisions of this Court.

Further, we respectfully submit that it appears that the said jurists believed that the end justified the means to such extent that they found it expedient to resort to sophistic arguments in the *Harris* case; and in the present case, to adopt erroneous rules of law and even outright fictions of law, to reach what they believed to be the morally correct and desirable result. We submit that rendition of Circuit Court of Appeals decisions, pursuant to this judicial philosophy, would, if allowed to go unchecked, reduce this Court from a position of being a Supreme Court of last resort -- which is entitled to make the ultimate ruling as to what is the morally and legally correct decision to be reached on any given federal question -- to a position of being merely one among equals with the Circuit Courts of Appeals.

II. THE INTERVENING EVENTS IN THE *HARRIS* CASE DEMONSTRATE THAT JUDGE PATEL AND JUDGE NOONAN FEEL FREE TO RULE ACCORDING TO THEIR OWN JUDICIAL CONSCIENCE AND CONTRARY TO THE RULE OF LAW AND DECISIONS OF THIS COURT

Judge Noonan stated in his New York Times article, that the civil rights action filed in District Court challenging execution by cyanide gas as being cruel and unusual punishment, was filed as a class action, and therefore, Judge Patel's order staying all executions in California by cyanide gas, pending a hearing on the constitutional issue, was a stay order which only incidentally stayed Harris' execution, because Harris was "only one of 323 death-row inmates in California on whose behalf the civil-rights action was brought." (App. J pp. 1-3)

Judge Noonan then noted in his article that the State of California did not agree that Harris was merely an incidental beneficiary of the class action suit and Judge Patel's stay order because:

> "The state, anxious for him to meet his date with death, claimed that the case was really 'a Harris case,' unfairly brought at the last moment to throw his execution off track." (App. J pp. 1-3).

Judge Noonan then argued in his article that the issue thus presented was whether constitutional rights, such as protection against cruel and unusual punishment "are to be suspended or set aside to assure the orderly keeping of an execution date" (App. J pp. 1-3).

We respectfully submit that this statement of the issue completely begs the question. The question is not whether constitutional rights should be suspended or set aside to assure orderly keeping of an execution date; rather, the question is whether appeals in death penalty cases, raising claims of error or constitutional issues long known to counsel for appellant; can properly be deliberately withheld from inclusion in prior appeals, and then later filed as a separate piecemeal appeal at the eleventh hour, to obtain stay of execution. Further, whether the answer to this question is any different if such a last minute appeal is disguised in the form of a class action, raising a constitutional issue which has long been known to counsel filing the action, but filing

of which class action is deliberately withheld until shortly before a scheduled execution, to thus obtain yet another last minute stay of execution.

We further submit that Judge Patel and Judge Noonan were well aware that several weeks before Judge Patel issued her stay of all executions, on April 18, 1992; this Court had directed the Ninth Circuit to proceed with all deliberate speed to complete and dispose of an appeal in a death penalty case which arose in the State of Washington, and (if we have an accurate recollection of the newspaper article describing this Court's order in that case) suggesting that this Court might have to assign that appeal to another Court, if the Ninth Circuit did not proceed to dispose of that appeal within a reasonable time. Therefore, we suggest that Judge Patel's issuance of stay pending decision on a constitutional question long known, and the Ninth Circuit's later issuance of stay for that same purpose, constituted refusal to follow this Court's prior direction to proceed with reasonable diligence to dispose of death penalty appeals.

This is demonstrated, we submit, by Judge Noonan's own article, in which he notes that the controversy over whether execution by cyanide gas is cruel and unusual punishment, is not a controversy or issue which arose for the first time at the unusual Saturday night hearing held by Judge Patel on April 18, 1992, but rather is a controversy and issue long known, which has resulted in all but three states that have capital punishment, abandoning use of cyanide gas, in favor of other methods of execution (App J pp. 1-3). Thus, the reasonable inference to be drawn is the one on which the State based its argument, and which inference and argument were apparently accepted by this Court; namely, that the filing of the class action was a contrived means of obtaining a last minute stay of execution from judges who are personally opposed to the death penalty on moral grounds and therefore do not feel bound to follow the rule of law or decisions or orders of this Court, where the result of doing so would be to permit executions to go forward.

We submit that the conclusive proof of this lies in Judge Noonan's article, which contains his express accusation that this Court forced the lower courts to commit treason to the Constitution, and his implied accusation that by so acting, this Court itself violated the Constitution. Those accusations could only be made, we submit, by a jurist who is convinced that his or her first and highest allegiance is to his or her own moral and judicial conscience, and that when morally convinced that a certain result should be reached in a given case or matter; that he or she is then free to rule in that manner, even though this involves refusing to follow the rule of law and decisions of this Court.

The record provides further confirmation that Judge Patel believes that her first and primary allegiance is to her own moral and judicial conscience, and that she is to be guided in her rulings and decisions by her own moral conscience, even if this means refusing to follow the rule of law, and the decisions or orders of a higher court. Thus, the record discloses that Judge Patel presided in *United States of America v. Felix W. Mitchell*, Northern District of California criminal action CR-83-0130-MHP in which "druglord" Mitchell was convicted and sentenced to prison by Judge Patel. Mitchell appealed to the Ninth Circuit, where his appeal was assigned No. 85-1169, and Mitchell then died before his appeal could be heard and decided. Citing and relying upon the long-settled law laid down by this Court in *United States v. Daniels*, 47 U.S. (How.) 11, 13; 14 L.Ed 323 (1848), holding that vacation of the judgment of conviction and dismissal of the indictment is required when a defendant-appellant dies pending appeal; the Ninth Circuit entered its order providing that:

> "The matter is remanded to the district court with instructions to vacate the judgment of conviction and to dismiss the indictment as to defendant Felix Wayne Mitchell, Jr."

Upon the remand going down, Judge Patel held a hearing at which she publicly announced that she would not obey the Ninth Circuit's order because that higher Court's order "clearly conflicts with my moral and ethical conscience."

Judge Patel then entered an order on August 14, 1987 in which she stated:

> "For the reasons stated during the above-mentioned hearing, this Court recuses itself from any further proceedings in the case against Felix Wayne Mitchell, Jr.
>
> This matter is referred to Robert F. Peckham, Chief Judge under the Assignment Plan for this Court, for reassignment."

III. THE FOREGOING DISCUSSION CONFIRMS THAT JUDGE PATEL AND THE NINTH CIRCUIT PANEL, INCLUDING JUDGE NOONAN, DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN THE PRESENT KRUSE CASE

We submit that the foregoing discussion confirms that Judge Patel and the Ninth Circuit panel, which included Judge Noonan, so far departed from the accepted and usual course of judicial proceedings in the present *Kruse* case as to call for an exercise of this Court's power of supervision. That is, Petitioners contend in their Brief In Support Of Petition and in their Brief In Reply To Opposition, that the record clearly demonstrates that the District Court refused to follow this Court's decisions in *Pulliam v. Allen*, 466 U.S. 522; 80 L.Ed. 565 (1984) and *Dennis v. Sparks*, 449 U.S. 24; 66 L.Ed.2d 185 (1980) and granted judicial immunity against injunctive relief to the state jurists (contra *Pulliam*) and granted derivative immunity to private party defendants (contra *Dennis*).

Further, that District Judge Patel did not do this directly, but rather did so indirectly, by adopting fictions of California law to sustain specious affirmative defenses of res judicata and Rooker-Feldman and then dismiss the §1983 action on that improper basis. Finally, that Judge Patel did that to reach what she perceived to be the morally correct and just result of protecting judicial independence, and the reputation of the judiciary, even though the unlawful dismissal of the action constituted an improper refusal to exercise §1983 jurisdiction; and resultant denial of Mrs. Kruse's right to seek to recover damages against the private party defendants for their alleged corruption of justice and violation of her federal constitutional rights.

In addition, petitioners contend in their Brief In Support Of Petition and Brief In Reply To Opposition, that the record is equally clear in its demonstration that the Court of Appeals affirmed the District Court's decision "for the reasons stated by the trial judge" and thus sanctioned the District Court's said complete departure from the accepted and usual course of judicial proceedings. Petitioners contend the record discloses this was done to reach what the Court of Appeals Judges were also convinced was the morally correct and desired result to be reached in this case, even though this involved refusal to follow decisions of this Court, and denial of procedural due process to the litigants. Moreover, that the Court of Appeals aggravated the injustice by its own denial of due process, by imposing sanctions for a frivolous appeal, over objection that it was violative of due process to impose such sanctions without first designating which arguments were

supposedly so lacking in merit as to be frivolous, and then giving an opportunity for filing a brief in opposition to sanctions on appeal.

Finally, the record discloses still further refusal by the Court of Appeals to follow decisions of this Court, and to instead reach the result which it desired to reach. Under the rule announced by this Court in *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 249-250; 88 L.Ed. 1250 (1943) and *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 580; 90 L.Ed. 1447 (1945) the Court of Appeals had both the authority and the duty to investigate any suggestion made to that Court and supported by facts giving substance to the suggestion, that that Court has been imposed upon and caused to render its decision by fraud perpetrated upon the Court by an opposing party and/or counsel.

In January, 1992, petitioners filed motions with the Court of Appeals requesting investigation of fraud upon the Court by Defendant/Respondent State Court of Appeal Justice Newsom and his legal counsel, supported by a showing of facts which were already known to the Court of Appeals from the record, and citation and discussion of law newly discovered in additional research by Petitioners:

The record reflects that counsel for Justice Newsom were paid over $224,000 by the State for providing a defense to Justice Newsom, by rendition of services which consisted of nothing more than handling his motion to dismiss the action and his motion for sanctions. Further, that the declaration of his counsel indicated that they had forwarded all billings to Justice Newsom, who in turn had presented those billings to a State official who had approved payment of State monies directly to his legal counsel. It appeared that counsel for Justice Newsom had therefore not entered into a contract with the State, to be employed by the State to render the defense to Justice Newsom.

By contrast, declarations filed by counsel for Justice Racanelli disclosed that his counsel had entered into a contract with the State, which limited the amount of fees to be paid, to reasonable fees for services reasonably required, and counsel for Justice Racanelli received $25,000 payment for rendition of the same services as were rendered for Justice Newsom.

As the Court of Appeals was also aware, petitioners strongly objected to Justice Newsom's counsel's request for award of sanctions in the amount of attorney's fees and costs of over $224,000 that had been paid by the State. That objection was made

on the ground that counsel had assembled a team of 22 lawyers, law clerks and paralegals to inflate the fees for the purpose of having huge sanctions imposed. The District Judge agreed that the case had been overstaffed, work had been duplicated, and the fees were therefore excessive, but then only reduced the request by $58,000, and awarded sanctions of $166,000 to Justice Newsom's legal counsel, because of their insistence that all of the fees and costs were reasonable, or the State would not have paid the same. (App. E pp. 37-38)

Petitioners cited to the Court of Appeals, newly discovered law that it is unlawful and illegal for the State to make payment to private counsel to defend a State official, unless the private counsel have first entered into a standard written contract of employment, which limits and restricts payment of fees and costs to reasonable fees and costs. Further, that it is a crime under California Penal Code §72 for anyone to present a false claim for payment to the State, with intention to defraud, and that at least as to the $58,000 which the District Judge found was excessive and unreasonable, that amount of payment by the State had been fraudulently obtained.

When this suggestion of fraud upon the Court was made to the Court with copies to opposing counsel, counsel for Justice Newsom did not present any evidence that they had in fact entered into a contract as required, and thus tacitly admitted that all payments received by them were illegally received and illegally held, and subject to being recovered by the State in their entirety, since the law is that under such circumstances, private counsel are not entitled to even quantum meruit compensation.

It was further suggested to the Court of Appeals that under these circumstances, it appeared to be proven that Justice Newsom had conspired with his legal counsel, to illegally and even fraudulently obtain payment from the State, of grossly inflated attorney's fees and costs, so that those could then be recovered as a fraudulently induced award of sanctions.

Despite this suggestion supported by the said facts and law, the Court of Appeal declined and refused to investigate fraud upon the Court and resultant grave miscarriage of justice in the Court of Appeals decision.

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Respectfully submitted,

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Should Executions Run On Schedule?

BY JOHN T. NOONAN

SAN FRANCISCO - "Treason to the Constitution" is a strong charge. It was the phrase employed in 1921 in argument before Chief Justice John Marshall to describe a federal court's failure to exercise its jurisdiction in a case properly brought before it.

On Saturday evening, April 18, a courageous federal judge, Marilyn Hall Patel, refused to commit treason to the Constitution and in a suit brought under the Civil Rights Act, ordered a hearing on whether death by cyanide gas was cruel and unusual punishment prohibited by the Constitution.

Her order also affected the execution of Robert Alton Harris, the condemned murderer scheduled to die on April 21.

Not even the most doctrinaire "original intent" jurist maintains that the determination is to be made as of 1791, when the Bill of Rights became part of the Constitution.

Since *Weems vs. United States* in 1909 we have been committed to an evolving standard of human decency.

Second, a good index of what is cruel and unusual is what the state legislatures allow.

In 1992 just three states authorize cyanide gas as the only means of inflicting capital punishment.

One, Arizona, is in the process of abandoning the method and another, Maryland, has not had an execution since 1961.

It is a serious question whether the consensus of all the other legislatures shows that California's means of carrying out the death penalty violates the constitutional norm.

Third, any "unnecessary suffering" in imposing the death penalty is forbidden by the Constitution.

The Constitution permits capital punishment; it does not permit torture.

Judge Patel was presented Saturday night with a mass of affidavits asserting that the use of the gas chamber did lead to a tortured death.

It is an important question whether this evidence could be rebutted.

Concluding as a matter of common sense that these questions could not be answered on a Saturday night, Judge Patel set a hearing to be held in 10 days where testimony could be taken and the arguments, pro and con, fully explored.

Pending the hearing, she prohibited the use of lethal gas to execute anyone.

The immediate beneficiary was Harris.

He was only one of 323 death-row inmates in California on whose behalf the civil-rights action was brought.

The state, anxious for him to meet his date with death, claimed that the case was really "a Harris case," unfairly brought at the last moment to throw his execution off track.

The state's contention brought into focus an issue now before the country -- not the death penalty itself, but whether the precedents, built up over this century for guarding everyone's civil rights, are to be suspended or set aside to assure the orderly keeping of an execution date.

About 3 a.m. on Tuesday the U.S. Supreme Court decided that the Harris execution must stay on track.

Federal courts must no longer exercise their jurisdiction in ways that would derail it.

Profound ambivalence had existed.

We are a country with a Constitution and a Bill of Rights, which we celebrate and cherish and which the courts enforce.

We are a country with a Civil Rights Act that no one wants to appeal.

But we are also a country where some states by vote have determined that atrocious crimes may be punished by death.

Prompt enforcement of that penalty conflicts with the precedents built up under the Constitution, Bill of Rights and Civil Rights Act.

If death penalties are to be inflicted according to a state's schedule, these protections must give way.

So, at least, is the present position of the U.S. Supreme Court, Justices Harry A. Blackmun and John Paul Stevens dissenting.

That court has resolved the national ambivalence and decided that it is intolerable for a federal court to delay an execution to decide a constitutional question.

Harris was a casualty of this decision. Was the Constitution, too?

John T. Noonan is a judge of the U.S. Court of Appeals for the Ninth Circuit. From the New York Times.